Neutral Citation Number: [2019] EWHC 307 (Ch)

Case Nos: CH-2019-000017
BR-2018-001239

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
CHANCERY DIVISION
ON APPEAL FROM THE INSOLVENCY AND COMPANIES COURT
ORDER OF INSOLVENCY AND COMPANIES COURT
JUDGE JONES DATED 20 DECEMBER 2018

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 12 February 2019

Before :

THE HON MR JUSTICE HENRY CARR

- -

Between :

ISLANDSBANKI HF	**Appellant**
- and -	
KEVIN GERALD STANDFORD	**Respondent**

- -
- -

MR JOSEPH ENGLAND (instructed by Harrison Drury Solicitors) for the **Appellant**
MR DANIEL BURKITT for the **Respondent**
MISS G. KAPLAN of Pinsent Masons LLP appeared on behalf of **Supporting Creditor Shineclear Holdings Limites**

Hearing date: 12 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HENRY CARR

Mr Justice Henry Carr:

Introduction

1. The Appellant ("**IB**") seeks permission to appeal paragraph 1 of the order of Insolvency and Companies Court ("**ICC**") Judge Jones dated 20 December 2018. That order adjourned IB's first-in-time petition and listed it for hearing with a second-in-time petition presented by HMRC (BR-2017-001162) against the Debtor listed for final hearing on 22 February 2019, as well as with a third-in-time petition brought by Shineclear Holdings Limited (BR-2018-000423) against the Debtor which is at the directions stage.

2. The Appellant has applied for its application and, if applicable, any subsequent appeal, to be heard on an expedited basis so that the matters under appeal can be resolved prior to the 22 February 2019 hearing.

Background

3. IB is an Icelandic bank and the Debtor is a well-known businessman who founded leading fashion brands such as All Saints and (with his former wife of that name) Karen Millen. IB is the lead petitioner for bankruptcy against the Debtor, having presented its petition on 6 April 2017.

4. IB's petition is founded on unsatisfied execution (rather than a statutory demand). It is based on an unpaid Icelandic judgment for c.£1.3 million arising from the Debtor's undisputed failure to repay a loan made to him by IB's predecessor. The petition is, however, disputed on procedural grounds as set out in the Debtor's Notice of Opposition dated 4 February 2018.

5. The petition was originally presented in the Maidstone County Court (case no. 18 of 2017) as that was the local Court to where the Debtor was resident. IB then experienced a number of delays in Maidstone, including orders adjourning the hearing of its petition dated 6 July 2017, 2 October 2017 and 27 November 2017.

6. Unbeknownst to IB and its representatives at the time, HMRC presented a petition against the Debtor for c.£7 million in the Companies Court on 22 August 2017. HMRC's petition is resisted essentially on the grounds of an unreasonable refusal of an offer.

7. A further petition was then presented by Shineclear, originally on 20 September 2017 in the Maidstone County Court. The Shineclear petition is for c.£6 million and is resisted on a number of complicated grounds which it is not necessary to explain. Solicitors acting for Shineclear and a related interested party, Kaupthing ehf ("**KP**"), attended a hearing in Maidstone on 2 October 2017 of IB's petition, which was adjourned by the order of DDJ Robson of that date until 1 December 2017. That hearing was then adjourned to 18 December 2017 by the order of DDJ Horrocks dated 27 November 2017. Shineclear and KP filed Notices of Intention to Appear as supporting creditors in relation to the adjourned hearing.

8. At the 18 December 2017 hearing in Maidstone, the Court (after the agreement of the legal representatives of the parties present) separated the Shineclear and IB petitions. Directions were thus made for a final hearing in Maidstone for the IB petition in the order dated 18 December 2017 of DDJ Tennant. A separate order was made in relation to the Shineclear petition, which IB later discovered was then transferred in February 2018 to the Companies Court.

9. By the order of DDJ Thompson sitting at Maidstone dated 29 March 2018 further directions were made in the IB Petition. A final hearing was listed to take place on 1 August 2018 in Maidstone.

10. On 17 July 2018, IB discovered by way of a letter from the Debtor's solicitors to KP's solicitors, to which IB's solicitors were copied, that IB's petition had been transferred to the Companies Court. The transfer was ordered in IB's absence at a directions hearing on 21 May 2018 in the Shineclear petition by an order of Chief ICC Judge Briggs sealed on 25 May 2018. That order also made various directions relating to the Shineclear petition.

11. There then followed a 15-minute hearing to resolve a discrete issue between KP and the Debtor on 18 July 2018, which none of the petitioning creditors attended. Despite this, the Debtor persuaded the Court to list all three petitions together for a joint CMC at that hearing as recorded in the order of Deputy ICC Judge Shekerdemian QC dated 18 July 2018.

12. IB and Shineclear then applied to vary the order of 18 July 2018 pursuant to s.375 of the Insolvency Act 1986 including on the basis that the petitioners had not been present on 18 July 2018 and for substantive reasons (supported by evidence) as to why the petitions should not be jointly heard or case managed together. The 18 July 2018 order was varied by the order of Chief ICC Judge Briggs dated 1 August 2018, who ordered that the petitions should not be case managed or heard together. Following that, the Court listed IB's petition (the first in time of the three petitions) for a final hearing on 13 September 2018 for half a day.

13. The Debtor then applied to review the 1 August 2018 order of Chief ICC Judge Briggs including on the basis that it had not had the opportunity to put in evidence before the order was made. The matter was listed for hearing before Deputy ICC Judge (and former Chief Registrar) Baister on 6 September 2018. The parties filed evidence and Counsel attended on behalf the Debtor, KP and all three petitioners. The Judge dismissed the application and ordered costs against the Debtor, and ordered that IB's petition should be heard first on 13 September 2018.

14. IB's petition then came before Deputy ICC Judge Middleton on 13 September 2018. It was then adjourned by consent in view of settlement discussions between the parties with a new hearing date of 20 December 2018 listed.

15. Meanwhile, there followed a lengthy directions hearing in the Shineclear petition on 17 September 2018 before ICC Judge Jones which dealt with various disputed issues including the Debtor's claim for privilege over an opinion by Lord Goldsmith QC. A further directions hearing is due to be listed for a day in that petition to resolve various issues between the parties before a final hearing can be listed in that petition.

16. The Debtor had also applied for a stay of the HMRC petition so that the Shineclear petition could be heard before HMRC's petition. It did so on the basis that if it could dismiss the petitions against Shineclear (and IB) first, it would then be able to pay HMRC due to an offer of funding that was conditional upon those events occurring. This was rejected by the order of Deputy ICC Judge Middleton on 2 October 2018 and HMRC's petition was listed for 1 day on 22 February 2019, a date comfortably after when it was thought the outcome of IB's petition on 20 December 2018 would be known. The Debtor then applied under s.375 of the Insolvency Act 1986 to review the decision not to stay the HMRC petition, which application was dismissed on 30 January 2019.

17. The final hearing of IB's petition came before ICC Judges Jones for a half day on 20 December 2018. Both parties filed skeleton arguments and a list of issues in addition to one hearing bundle. A transcript of the hearing is appended to the Appellant's Notice.

18. By the time of the hearing, as the Debtor's skeleton (appended to the Appellant's Notice) makes clear, the issues essentially were: (i) the effect of IB not being able to prove service of the order registering the Icelandic judgment in England and Wales and issuing a writ of control before the period for appealing that registration order had expired; and/or (ii) whether execution had been proven for the purposes of s.268(1)(b) of the Insolvency Act 1986 with particular regard to the decisions in *Skarzynski v Chalford Property Co Ltd* [2001] BPIR 673 and *Norbet Heller v First Commercial Bank plc* (1995) WL 1083740 (CA).

19. IB's position is that after hearing extensive submissions on the issues, matters then took a more unusual turn starting at the top of page 53 of the transcript. Pages 53-54 then show the Judge wishing to step back and examine the reality of the situation. He asked the Debtor's Counsel to take instructions on whether the Debtor intended to challenge the Icelandic judgment or not because, even if he were to dismiss IB's petition, IB could issue a statutory demand if the debt was not disputed.

20. The Judge realised that supporting creditors/other petitioners were present and heard brief submissions from their representatives, whereupon he was made aware of various outstanding issues in the Shineclear petition including an order at the time not being agreed from the aforementioned directions hearing of 17 September 2018. He was also informed that the HMRC petition was listed for 22 February 2019. Matters returned to an outstanding issue in the IB petition. The Judge then at page 63D said this:

> *"Well, since I am going to adjourn this anyway, I want to get everybody - all the parties - back. It is clearly unsatisfactory there is no order from what happened in September. It is clearly unsatisfactory in regard to your petition that the evidence is not yet put in. I need to know what is happening with regard to all three in this context. The only complication is I do not want to lose the time by having too long a period of time but I have got to get people involved."*

21. Having noted that HMRC's petition was listed on 22 February 2019, he then asked for and was provided with a brief summary of what that petition was about at pages 63G-64A. He thought a day was rather a long time for that petition but then said at page 64F: *"I will hear the HMRC on 22nd, so I will adjourn this and ask to be listed your Shine petition for 22nd."*

22. Counsel for IB, Mr England, wanted to know if the IB petition would be heard first in time. The Judge indicated that he could vary orders previously made if he wanted to and said that he could do what he wished despite the fact that the previous order was already a variation. It is clear from the transcript at pages 64G to 65F that he would decide which petition to deal with once he had heard from all the parties.

23. There then followed a discussion about the effect of the hearing on 30 January 2019 of the Debtor's application to review the decision to not hear Shineclear's petition before HMRC's petition.

24. Finally, the Judge made clear that he wished to get everyone back together on the 22nd February 2019.

Permission to appeal

25. This is an extremely unusual application for permission to appeal because I have heard from Mr England for the Appellant, IB, Mr Burkitt for the Respondent Debtor and from Miss Kaplan, of Pinsent Masons, on behalf of Shineclear, the third-in-time petition. All the parties have said before me that the Judge was wrong to make the decision that he did and that he erred in principle.

26. In light of the fact that the parties are unanimous that the Judge was wrong, I consider it appropriate to grant permission to appeal.

The grounds of appeal

27. I will now turn to the grounds of appeal. It is submitted by Mr England that the Judge was wrong and irrationally exercised his discretion and/or there was an irregularity in the proceedings in the lower court by reason of:

    (1) Adjourning IB's petition having not given judgment or indicating when judgment would be given (Ground 1); and

    (2) Adjourning IB's petition so that it was listed for hearing with two other later-in-time petitions (Ground 2).

28. Mr England submits that the learned Judge failed to give any or any proper reasons and/or hear submissions from the parties prior to making that decision, a decision which was contrary to two previous judicial determinations and made without relying on any change of circumstance.

29. It is correct that IB's petition has been subject to numerous procedural delays and a large number of adjournments since first presented in April 2017. It is submitted, and I agree, it is plainly beneficial that IB's petition is disposed of without undue delay for the progress of the bankruptcy for all creditors including those with subsequent petitions.

30. It is settled law, especially in a bankruptcy context, that adjournments should be exercised sparingly – see, for example, the judgment of Lewison LJ in Sekhon v Edginton [2015] EWCA Civ 816.

31. Mr England submits that the Judge, having heard full argument on the issues, should have given judgment or indicated when he would, and at least make clear it would be prior to HMRC's petition on 22 February 2019. Mr England complains that from the passages cited above from the transcript, the status of the 22 February 2019 hearing is unclear, despite attempts to clarify what it would entail by those present at the hearing. It is not clear, for example, whether IB and the Debtor will be required to make further submissions and if a judgment will be given in IB's petition before hearing HMRC's petition, which would not be necessary if IB's petition is successful.

32. It is said it would be contrary to the overriding objective if, having had half a day's hearing on a petition incurring the expense and resource of the Court and the parties, to then hear another petition and decide. Conversely, it is disproportionate to make HMRC and the Debtor prepare for a full day hearing that may be redundant if IB's petition succeeds.

33. Furthermore, the Judge required Shineclear to attend on 22 February 2019 and indicated that he wanted to resolve outstanding issues in that third-in-time petition and perform a general case management review of the various petitions. No further case management is necessary with IB's petition as it has been heard and HMRC's has also listed been for final hearing. The decision may also mean that neither of these petitions is finally disposed of on 22 February 2019. HMRC's has been listed for a full day already. IB's petition has not yet had judgment and Shineclear's is very far off from being ready for final hearing. Time may therefore be wasted resolving different issues from different petitions rather than just resolving one petition first.

34. In the circumstances, all parties who were represented before me said that they were in a state of confusion as to how to prepare and what the 22 February 2019 hearing should be about, despite attempts to clarify that at the hearing.

35. The second ground of appeal is that the Appellant's first-in-time petition should not be heard alongside the other later-in-time petitions, and should be disposed of before and separately from them. This is in accordance with the orders made by Judge Briggs and Deputy Judge Baister.

36. By his decision of 1 August 2018, Chief ICC Judge Briggs examined the matter and ordered that the petitions should be not be heard or case managed together. A listing was then obtained for IB's petition to be finally determined on 13 September 2018. The Debtor then applied to review the decision of Chief ICC Judge Briggs pursuant to s.375 of the Insolvency Act 1986 (including on the basis it had not submitted evidence before the 1 August 2018 order was made). A hearing was then listed before Deputy ICC Judge (and former Chief Registrar) Baister on 6 September 2018.

37. At that hearing, evidence was before the Court from all relevant parties and Counsel attended on behalf of the Debtor, all three petitioners and KP. After hearing from the parties, Deputy ICC Judge Baister dismissed the Debtor's application and made a costs order against the Debtor. He held that the petition of IB should be heard first and was not persuaded by the merits of the petitions being heard or case managed jointly. That decision was not subject to any appeal by the Debtor and the Judge ordered the IB petition for final hearing before the other petitions on 13 September 2018. There has been no change in circumstance and no reasons given to vary that order.

38. This was therefore a decision taken without warning, without a change in circumstances being relied on, without any request for it from the parties.

39. There is a clear reason underlying why IB's petition should be heard first and not listed with the other petitions. One of the reasons it is important that, when person is made bankrupt, it is on the petition presented first-in-time is because of the "look back date" for reviewable transactions. This is in the interests of creditors as a whole and the trustee in bankruptcy so as not to limit the scope of recovery.

40. In particular, pursuant to s.284 of the Insolvency Act 1986, where a person is made bankrupt, any disposition of property made by that person in the period starting with the date of presentation of the petition is *prima facie* void. Pursuant to ss. 339 to 341 of the Insolvency Act 1986, the "relevant date" (or "look back date") for a trustee in bankruptcy to set aside transactions at an undervalue or preferences is calculated by reference to the date of the presentation of the bankruptcy petition on which the individual is made bankrupt.

41. I have considered a Second Witness Statement of Robert David Huxley Turner and one particular transaction mentioned is necessary to summarise.

42. On 1 May 2015 (within two years of presentation of the IB's petition on 6 April 2017 but not within two years of the date of presentation of the other petitions), the Debtor sold a Ferrari for more than £1 million. The Debtor states in his witness statement that the balance of the sale proceeds after repayment was transferred to his wife. His witness statement goes on to describe further instances where he borrowed sums against the security of valuable cars owned by him and transferred such sums to his wife. These transfers may be susceptible to challenge by the trustee in bankruptcy as transfers at an undervalue and/or preferences.

43. In circumstances where the petition debts are very large (HMRC's is c.£7 million), such transactions take on more significance. The existence of these transactions was also noted by Deputy ICC Judge Middleton at the hearing on 2 October 2018 when he refused to stay the HMRC petition in favour of first hearing that of Shineclear.

44. IB says that there is a real risk that creditors may be prejudiced if the relevant date is brought forward, especially in relation to transactions over the valuable cars which occurred within two years of the date of IB's petition only. Therefore, it says there is a very significant reason to hear the first admitted debt petition first.

45. The overriding objective, especially proportionality, was a relevant consideration for Judge Jones' decision as it is for this Court in considering this appeal. The effect of the Judge's decision leads to costs of preparing and dealing with subsequent petitions, in circumstances when the Debtor may be made bankrupt first in the Appellant's petition. If HMRC's petition is heard first, the hearing on 20 December 2018 (and much of IB's petition and the costs thereof and the Court resource dedicated to it) would have been rendered futile.

46. That is supported by Mr Burkitt on behalf of the Respondent Debtor who has prepared a short note and appeared before me today. The Respondent's position is that while he takes issue with some of the issues set out in the Appellant's skeleton, the Respondent broadly supports the Appellant's application for permission to appeal and the appeal.

47. The Respondent's position is that the decision to adjourn the Appellant's petition after hearing full argument at a final hearing was perverse. It was made because the learned Judge was concerned about the difficulty of giving judgment (in particular the lack of authority on one issue) and not for any proper case management reason. It is unnecessary, it is said, for the Respondent to incur the cost of preparing for a one day hearing of HMRC's petition without knowing whether that petition will even be heard. There is no point in the Respondent, HMRC, the Appellant, Shineclear and KP incurring the considerable costs of preparing and attending to argue that petition only for the Respondent to be made bankrupt on the Appellant's petition at the start of the hearing.

48. The Respondent, it is said, has incurred considerable costs in dealing with the Appellant's petition. The costs orders in the Appellant's petition have all been "costs in the petition". It would be wrong to deprive the Respondent Debtor of those costs if the Appellant's petition is dismissed and the Debtor is made bankrupt on a subsequent petition after hearing full argument to determine the Appellant's prior petition.

49. It is pointed out that the Respondent has obtained a loan of £8 million to pay HMRC, conditional on the petitions of the Appellant and Shineclear being dismissed. The Respondent wishes for those petitions to be heard first but it appears that HMRC's petition will be heard first.

50. Finally, I heard from Miss Kaplan who made clear that Shineclear's position is that the Judge was wrong in principle to adjourn IB's petition to 22 February 2019, but that Shineclear's primary concern was to ensure the hearing of HMRC's petition on 22 February 2019 is not adjourned.

Discussion

51. I originally considered this to be a case management decision by the judge, which should not be interfered with by an appellate court. I said in my order of 1 February 2019 that the Appellant had no reasonable prospect of success of overturning the Judge's decision. I considered that the Judge's decision was within the ambit of reasonable decisions that were open to him and he had a wide discretion in respect of case management.

52. I also said that contrary to the Appellant's grounds of appeal, the Judge did not order a variation of the Orders of Registrar Briggs and Registrar Baister. He made it clear that on 22 February 2019 he might decide to hear the Appellant's petition first. The listing of the Appellant's petition with the two other petitions referred to above does not preclude the Judge from disposing of the Appellant's petition before disposing of the other petitions.

53. Having read the transcript and with the benefit of submissions from several interested parties I now understand the case much better. I have considerable sympathy for Judge Jones as he was presented with complex facts and difficult legal principles to resolve.

54. However, given that none of the parties support his decision I consider that whilst the Judge was entitled to adjourn his decision having heard full argument on the merits and to ask for further submissions from Counsel on unclear legal points, I consider that he should as a matter of principle dispose of the IB petition first on 22 February 2019.

55. In reaching this conclusion I accept the arguments advanced by the parties on this appeal. I consider that having heard full argument on the merits this was not a normal case management decision. I am persuaded that if there was any question of him hearing the second or third-in-time petition before the first (IB's) Judge Jones would have needed to give a reasoned judgment in the light of two previous orders of ICC Judges that the IB petition should be heard first. He did not do so.

56. I have considered the position of the Debtor that effectively neither the second or third petitions should be heard on 22 February 2019 but I am not going to decide this point given the fact that the stay of HMRC's petition has not been ordered.

57. I am going to order that on 22 February 2019 IB's petition shall be disposed of before the other petitions. I do so with great respect to the Judge's case management powers but this goes beyond a simple case management order.

Post-script

58. This case illustrates the difficulty of making orders on applications for permission to appeal without submissions from the respondent. I considered in this case making an order for the respondent and supporting creditors to make brief submissions on paper. I did not do so because of the urgency in getting this issue resolved. It might be a useful practice in appropriate cases for judges considering such appeals on paper to allow respondents to be served or have access to the relevant file, and to make brief observations on permission to appeal. In this case it might well have enabled this appeal to be granted without a hearing.